79-661

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5279

MICHAEL E. LaGORGA, Petitioner

v

UNITED STATES OF AMERICA

PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael E. LaGorga,
Petitioner
Terre Haute Honor Camp
P.O. Box 33
Terre Haute, Indiana
47808

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Michael E. LaGorga, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on September 24,1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, infra, page 6. The judgment of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, infra, page 6. The Journal Entry of Judgment of the United States District Court, Northern District of Ohio, Eastern Division, is printed in Appendix B hereto, infra, page 8.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A, infra, page 6) was entered on September 24, 1979. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether an order denying a motion to disqualify a trial judge under 28 U.S.C § 455 is reviewable on appeal prior to the rendition of final judgment by the trial court.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1291 which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This is a criminal action brought by the United States of America, the respondent, against Michael E. LaGorga, the petitioner. The issue before this Court arose when the United States Court of Appeals for the Sixth Circuit held that a motion to disqualify a trial judge under 28 U.S.C. § 455 is not reviewable on appeal prior to the rendition of final judgment by the trial court.

The instant action was commenced when a

federal grand jury returned indictments against the petitioner which alleged that he had engaged in counterfeiting, conspiracy to counterfeit and plate making in violation of 18 U.S.C.§§ 471, 474, 2 and 371. Approximately five (5) months prior to trial, the petitioner filed his motion to disqualify the trial judge pursuant to 28 U.S.C. § 455 on the ground that the petitioner intended to call the trial judge as a defense witness at the trial. In support of the motion, the petitioner alleged that various activities of the trial judge in an unrelated criminal case involving the petitioner rendered it necessary to call the trial judge as a witness to establish material elements of the petitioner's defense in the pending criminal matter.

The trial court denied the petitioner's motion and the issue was immediately appealed to the United States Court of Appeals for the Sixth Circuit. After consideration of the respondent's motion to dismiss the appeal, that court ruled that the district court's order was not an appealable decision under 28 U.S.C. § 1291. It is from that decision that the petitioner now seeks issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The issue in this case involves the petitioner's Sixth Amendment right to a fair trial wherein he be permitted to compel the attendance of witnesses on his behalf. The action of the trial judge in refusing to disqualify himself effectively precluded the petitioner from exercising the rights conferred by the Sixth Amendment.

The action of the court of appeals, in dismissing the appeal on the basis that the trial court's order was a nonpermissible interlocutory appeal further prevented the petitioner from exercising his Sixth Amendment rights. Petitioner submits that upon the basis of the specific facts of this case, the court of appeals should have permitted the interlocutory appeal.

Petitioner further submits that because a fundamental constitutional right is involved and because this Court has not yet spoken on the important issue raised, this Court should allow the requested writ of certiorari.

CONCLUSION

Wherefore, the petitioner respectfully prays that a writ of certiorari be granted.

MICHAEL E. LaGORGA
Petitioner

APPENDIX A

No. 79-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL E. LaGORGA,
Defendant-Appellant

O R D E R

BEFORE: CELEBREZZE, Circuit Judge, PHILLIPS and PECK, Senior Circuit Judges

Upon consideration of the appellee's motion to dismiss this appeal, and further considering the appellant's response thereto,

And it appearing that the district court's order is not an appealable decision under 28 U.S.C. § 1291, Albert v. United States District Court for the Western District of Michigan, 283 F.2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); Collier v. Picard, 237 F.2d 234 (6th Cir. 1956), accordingly,

It is Ordered that the motion be granted and the appeal is hereby dismissed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

John P. Hehman, Clerk

APPENDIX B

8/6/79 Denied

/s/ Thomas D. Lambros

AFFIDAVIT OF SERVICE

I, Michael E. LaGorga, being first duly sworn, depose and say that three (3) copies of the foregoing Petition for Writ of Certiorari were forwarded to Stephen R. Olah, Special Attorney, U.S. Department of Justice, Cleveland, Ohio 44114 and to Stephen J. Wilkinson and Christopher M. McMurray, Attorneys, U.S. Department of Justice, Washington D.C. 20530, by regular U.S. mail, postage prepaid this 22nd day of October, 1979

MICHAEL E. LaGORGA

SWORN TO and subscribed in my presence this 21 day of October, 1979

Notary Public

No. 79-661

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL E. LAGORGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MICHAEL E. LAGORGA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the denial of his pretrial motion to disqualify the district court judge is appealable as a final decision under 28 U.S.C. 1291.

1. Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of counterfeiting, in violation of 18 U.S.C. 471, one count of making counterfeit plates, in violation of 18 U.S.C. 474, and one count of conspiracy, in violation of 18 U.S.C. 371. Thereafter, he moved under 28 U.S.C. 455 to disqualify the trial judge, United States District Judge Thomas D. Lambros. Petitioner claimed that because Judge Lambros had presided in an earlier case in which petitioner pleaded guilty, he would be a

valuable witness for petitioner's defense on the instant charges.[1] Judge Lambros denied the motion (Pet. App. B). The court of appeals held that the order was not appealable under 28 U.S.C. 1291 and dismissed the appeal (Pet. App. A).

Before sentencing in the earlier case, petitioner offered to cooperate with the Secret Service in its investigation of the counterfeiting operation that is the basis of the present indictment. Accepting petitioner's offer, a Secret Service agent and a Department of Justice attorney appeared before Judge Lambros ex parte to explain that petitioner was assisting in this investigation and to ask that his sentencing be continued until a later date. The judge granted the request. Petitioner's underlying contention is apparently that the information that Judge Lambros learned from the Secret Service agent and the Department of Justice attorney during the ex parte discussion would be useful in impeaching their anticipated testimony against him in the present case.

2. Without citing any authority, petitioner contends that the trial judge's refusal to disqualify himself was an appealable "final decision" and that the court below erred in dismissing the appeal. This claim is without merit. An order denying a motion to disqualify a judge is not reviewable on appeal until a final judgment has been entered in the case. See *United States* v. *Washington*, 573 F. 2d 1121 (9th Cir. 1978); *In re Virginia Electric and Power Co.*, 539 F. 2d 357 (4th Cir. 1976); *Scarrella* v. *Midwest Federal Savings and Loan*, 536 F. 2d 1207

[1]28 U.S.C. 455(b)(5)(iv) provides that a judge "shall disqualify himself * * * [if he] * * * [i]s to the judge's knowledge likely to be a material witness in the proceeding."

(8th Cir.), cert. denied, 429 U.S. 885 (1976); *Robinson* v. *Largent*, 419 F. 2d 1327 (3d Cir. 1969); *Rosen* v. *Sugarman*, 357 F. 2d 794 (2d Cir. 1966); *Albert* v. *United States District Court*, 283 F. 2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); *Collier* v. *Picard*, 237 F. 2d 234 (6th Cir. 1956); see also 9 *Moore's Federal Practice* para. 110.13[10] (1975 ed.).[2]

A contrary result would be inconsistent with the "firm congressional policy against interlocutory or 'piecemeal' appeals," *Abney* v. *United States*, 431 U.S. 651, 656 (1977). "Adherence to [the] rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* at 657, quoting *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). See *United States* v. *MacDonald*, 435 U.S. 850 (1978). Although there are certain exceptions to the finality rule for collateral orders, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), interlocutory appeals are permitted in criminal cases only in very limited circumstances: denial of a motion to dismiss on the basis of the Speech or Debate Clause, *Helstoski* v. *Meanor*, No. 78-546 (June 18, 1979); denial of a motion to dismiss on double jeopardy grounds, *Abney* v. *United States*, *supra*; and denial of bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951).

[2]This rule of nonappealability applies whether the motion for disqualification is brought under 28 U.S.C. 144 or, as here, under 28 U.S.C. 455. *In re Virginia Electric and Power Co.*, *supra*; *Scarrella* v. *Midwest Federal Savings and Loan*, *supra*; 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3553 (1975 ed).

For an order to be immediately appealable, the *Cohen* rule requires, *inter alia*, that the defendant would be irreparably harmed should trial go forward without resolution of the collateral issue; the decision must be more than merely a "step toward final disposition on the merits of the case." *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546; *Abney* v. *United States*, *supra*, 431 U.S. at 658. For instance, in the case of bail, the right in question—release pending criminal proceedings—could not be vindicated by an appeal taken at the conclusion of the proceedings. And the authorization of interlocutory appeals on Double Jeopardy and Speech or Debate Clause grounds is based on the fact that those constitutional provisions protect defendants against trial itself, not simply against conviction.

Refusal of a judge to disqualify himself is an entirely different matter. It is "intertwined" with the issue of guilt or innocence which will be resolved at petitioner's trial. *United States* v. *MacDonald*, *supra*, 435 U.S. at 859, because the question whether the trial judge would, in fact, be material to petitioner's defense is "best considered only after the relevant facts have been developed at trial." *Id.* at 858. Accordingly, as in *MacDonald*, *supra*, there is no "divorce between the question of prejudice [because of the judge's refusal to disqualify himself] and the events at trial." *Id.* at 859. If convicted, petitioner may seek review of the disqualification order. And, if successful on appeal, petitioner would suffer no prejudice since on remand he would be accorded the remedy he now seeks—the availability of Judge Lambros as a potential witness. See *United States* v. *Washington*, *supra*, 573 F. 2d at 1122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

DOJ-1979-12